No. 3550

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. E. YOUNG,

Plaintiff in Error,

vs.

CALIFORNIA STATE BOARD OF PHARMACY, et al.,

Defendants in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR E. T. OFF.

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PERNAU-WALSH PRINTING CO.

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Statement of the Case.

This action for conversion was commenced on June 24, 1919, to recover from defendants damages in the sum of $25,000 for their alleged illegal seizure of certain poisons and drugs owned by plaintiff. The defendant E. T. Off is the only one of the defendants who has been served as an individual as well as a member of the California State Board of Pharmacy, and it is for that reason that he appears and is represented individually. Accord-

ing to the allegations of the original complaint (Supplemental Transcript of Records, pages 1-12) the defendants, acting under the authority of the so-called Poison Act of the State of California, seized, while in the course of interstate commerce, certain drugs belonging to the plaintiff, consisting of gum opium, cocaine and morphine sulphate. Diversity of citizenship is not alleged in the original complaint and jurisdiction of the court was predicated upon the allegation that a federal question was involved through the seizure of these drugs while in transitu in interstate and foreign commerce. It appears from the complaint, however, that the seizure took place on April 16, 1915, and the demurrer of defendant E. T. Off that the complaint was barred by the statute of limitations was therefore sustained. The correctness of this ruling is clearly demonstrated in the opinion of the court rendered at the time and set forth at page 22 of the Supplemental Transcript of Record.

Therefore, on January 10, 1920, plaintiff filed his amended complaint (Transcript of Record, pages 1-7), which alleged that on May 1, 1919, the plaintiff demanded from defendants his above-mentioned drugs, then in the possession of the defendants, and that the demand was refused. In this way plaintiff sought to escape the statute of limitations and to create a new cause of action for conversion on May 1, 1919. Jurisdiction of the court was predicated upon the statement in the amended complaint that the drugs were "in transitu in interstate

and foreign commerce'' on May 1, 1919. It was not alleged, however, that the drugs were in transit in interstate commerce at the time they were seized. Furthermore, there was no allegation that the drugs were illegally in the possession of the defendants or that they did not have the right to retain them even after the demand for the return of the drugs was made. It is clear that the court had no jurisdiction of the cause of action and that in fact no cause of action was stated. Therefore, the demurrer of the defendant E. T. Off was sustained, and the court filed an opinion which is set forth at pages 18-19 in the Transcript of Record.

No permission having been given to file a second amended complaint in the order sustaining the demurrer to the amended complaint, the plaintiff moved the court for such permission. The defendants objected and in support of the objections the affidavit of Louis Zeh was presented and filed. (Transcript of Record, pages 28-32.) The motion was argued and submitted and thereafter the court denied the motion and later judgment was entered dismissing the action. (Transcript of Record, pages 32-33.)

It is from this judgment of dismissal that the plaintiff has sued out his writ of error to this court.

Argument.

THE SUFFICIENCY OF THE PLEA OF THE STATUTE OF LIMITATIONS IN THE DEMURRER TO THE ORIGINAL COMPLAINT.

Counsel for plaintiff in error does not question the correctness of the decision of the lower court that the cause of action set forth in the original complaint was barred by the statute of limitations. He contends that the defense of the statute of limitations was not sufficiently or properly pleaded in the demurrer and that, therefore, the court should have disregarded it.

Can counsel make this objection now? After the demurrer to the original complaint was sustained the plaintiff filed an amended complaint. Thus he acquiesced in the ruling of the court sustaining the demurrer. After the demurrer to the amended complaint was sustained, he again sought to file a second amended complaint and when permission to do so was denied and the action dismissed, he sued out his writ of error from that order. In appealing from the judgment of dismissal he cannot question the correctness of the lower court's decision in sustaining the demurrer to the original complaint.

However, even assuming that the decision is still open for review, there is no merit in the contention. Counsel cites no authorities to support his position. (Plaintiff's brief, pages 5-6.) By section 721, U. S. Rev. Stat., U. S. Comp. Stat. 1901, page 581, the laws of the several states, when not otherwise provided by the federal laws, shall be regarded as rules of decision in trials at common

law, in courts of the United States, when they apply. It has been uniformly held that the statutes of limitations are embraced within this act.

Bauserman v. Blunt, 147 U. S. 647;
Campbell v. Haverhill, 155 U. S. 610, 614;
Bullion & E. Bank v. Hegler, 93 Fed. 890, 892.

It is well-established that the defense of the statute of limitations can be raised by demurrer, if it clearly and affirmatively appears upon the face of the complaint that the cause of action is barred.

Pleasant v. Samuels, 114 Cal. 34;
Ord. v. De La Guerra, 18 Cal. 67;
Smith v. Hall, 19 Cal. 85;
Williams v. Bergin, 116 Cal. 56;
Cal. Safe Deposit & Trust Co. v. Sierra Valleys Railway Company, 158 Cal. 690;
Fay v. Costa, 2 Cal. App. 241;
Davis v. Mills, 121 Fed. 703.

Paragraph six of the amended demurrer of the defendant E. T. Off to the original complaint reads as follows:

> "That said complaint and the cause of action therein attempted to be stated is barred by the statute of limitations."

In Williams v. Bergin, 116 Cal. 56, 59, the defendant demurred to the complaint on the ground

> "that it appears upon its face that the supposed cause of action alleged therein is barred by the statute of limitations".

It was objected on appeal that this demurrer did not properly plead the statute. It was held that the demurrer in this form sufficiently presented the defense of the statute of limitations. The court goes on to explain the reason for the difference in the manner of pleading the statute in a demurrer from that of pleading it in an answer as follows:

> "The provisions of section 458 of the Code of Civil Procedure have reference to cases in which the statute is pleaded in the answer as an affirmative defense. It is an answer, and not in a demurrer, that '*facts* showing the defense' would be proper, and the provision that 'the party pleading must establish on the trial the facts showing the cause of action is so barred', clearly indicates that the section *has no reference to a demurrer* to a complaint upon the ground that the facts alleged therein show that the cause of action is barred. In such a case it is sufficient to specify the statute as one of the grounds of the demurrer."

In Fay v. Costa, 2 Cal. App. 241, 243, the same question was again presented and the court said:

> "In presenting the question of the bar of the statute of limitations by demurrer, it is not necessary to refer to the particular section relied on. In such a case, it is sufficient to specify the statute as one of the grounds of demurrer."

In Brennan v. Ford, 46 Cal. 7, 13, the defendant demurred to the complaint on the ground:

> "That it appears by the complaint that the cause of action is barred by the statute of limitations."

The court said:

> "The objection that the defense of the Statute of Limitations set up in the demurrer is not well pleaded in point of form, is not tenable. * * *
>
> But it is not the office of a demurrer to set out facts. On the contrary, all the facts involved in a demurrer are those alleged in the pleading demurred to, and the demurrer merely raises a question of law as to the sufficiency of the facts to constitute a cause of action or a defense. The demurrer is in this case, therefore, sufficient in form."

In the comparatively recent case of Spreckels v. Spreckels, 172 Cal. 775, 783, the court, in holding this form of demurrer good, said:

> "One ground of demurrer is that the cause of action is barred by the statute of limitations. The demurrer does not specify any section of the statute, but that is not necessary *when the question is raised by demurrer.* (Brennan v. Ford, 46 Cal. 7; Williams v. Bergin, 116 Cal. 59.)"

Therefore the demurrer to the original complaint in this action sufficiently pleaded the statute of limitations and was properly sustained.

THE ORDER SUSTAINING DEMURRER TO THE AMENDED COMPLAINT.

There is no doubt that the demurrer of E. T. Off to the amended complaint was properly sustained and we do not understand that counsel for plaintiff in error questions the correctness of that deci-

sion; at least we remember no argument to that effect in his brief. As appears from the court's opinion (Transcript pages 18-19) the demurrer was sustained on the ground that the court had no jurisdiction of the suit and that the complaint did not state facts sufficient to constitute a cause of action. The complaint did not allege diversity of citizenship and though it was alleged that the drugs were in transitu in interstate and foreign commerce, it does not appear that they were in the course of interstate commerce on May 1, 1919, when it is alleged that plaintiff demanded the return of the drugs from the defendants and on which demand and refusal the action for conversion as set forth in the amended complaint is predicated. It is true that the verification to the amended complaint states that the plaintiff is a citizen and resident of Arizona, but it nowhere appears in the complaint what is the citizenship of the defendants or that there is a diversity of citizenship between the parties. Indeed, it is well-established that the complaint must affirmatively show upon its face that there is a diversity of citizenship or a federal question involved to confer jurisdiction.

Hanford v. Davies, 163 U. S. 273.

Such essential allegations are entirely absent from the amended complaint. Furthermore, as stated by the lower court, the complaint did not state facts sufficient to constitute a cause of action for it did not show that the defendants were illegally in

possession of the drugs or that they had no right to retain them. The fact that the drugs were owned by the plaintiff, did not entitle him to their return from the defendants if the defendants had seized the drugs in the proper exercise of the powers conferred under the so-called Poison Act of the State of California, and there were no allegations in the complaint to show that the defendants had improperly or illegally seized the drugs.

THE PROPOSED SECOND AMENDED COMPLAINT.

The refusal of the lower court to permit a second amended complaint to be filed and its subsequent judgment of dismissal were proper for three reasons: (1) It did not appear from the proposed second amended complaint that the court had jurisdiction of the suit; (2) the complaint did not state a cause of action; (3) even assuming that there was a sufficient jurisdictional averment and that the complaint stated a cause of action, it appeared from the pleadings and the showing made on the motion to file a second amended complaint that the cause of action set forth in the proposed complaint was barred by the statute of limitations.

The Jurisdictional Averments in the Second Amended Complaint.

The second amended complaint bases its claim for jurisdiction upon the ground of diversity of citizenship and not upon the claim that there is a federal question involved. In the second amended

complaint there is no allegation whatever involving a federal question.

The second amended complaint was presented for filing on March 5, 1920; the original complaint was filed June 24, 1919. It is well-settled that the diversity of citizenship must exist *at the time the action was commenced.*

Metcalf v. Watertown, 128 U. S. 586;
Conolly v. Taylor, 2 Peters 556.

As already pointed out, the original complaint contained no allegations of diversity of citizenship. The only statement on this subject is to be found in the verification to the original complaint, which states:

> "That plaintiff resides in the city of Calexico; county of Imperial, state of California."

The amended complaint which was filed January 10, 1920, also does not contain any allegations as to diversity of citizenship, though the verification to that complaint alleges:

> "That plaintiff is a citizen of the state of Arizona and resides in said state of Arizona."

The only allegations in the proposed second amended complaint as to jurisdiction are as follows:

> "III.
>
> That the above-named plaintiff is a citizen of the state of Arizona.
>
> IV.
>
> That the above-named defendants are, and each one is, a citizen of the state of California."

Turning to the original complaint, it appears that there is no allegation therein as to diversity of citizenship. The statement in the verification that the plaintiff resides in Imperial County, California, is, of course, not equivalent to an allegation of citizenship but would be more likely to indicate that he was a citizen of California rather than any other state. There is no allegation as to the citizenship of the defendants and it is perfectly obvious that in this complaint no diversity of citizenship is alleged, nor does it appear that the plaintiff, at the time the original complaint was filed, was a citizen of any other state than California.

While the amended complaint alleges that the plaintiff is a citizen of the State of Arizona, it does not allege that he was a citizen of that state *at the time the action was commenced.* The same defect exists in the proposed second amended complaint. The most that can be assumed is that the plaintiff was a citizen of Arizona at the time that the amended complaint was filed, but that he was not a citizen of Arizona when the original complaint was filed. That this was the actual situation is corroborated by the fact that in the verification in the original complaint, filed June 24, 1919, it is stated that he was then a resident of Imperial County, California, while in the amended complaint, filed January 9, 1920, it was stated that he was then a resident of Arizona. It would appear from the pleadings that plaintiff had become a citizen and

resident of Arizona after the original complaint was filed.

However, this may be, the fact remains that the second amended complaint does not show that the plaintiff was a citizen of Arizona at the time the original action was commenced but merely that he was such a citizen at the time of presenting the second amended complaint. As already stated, it is essential that the complaint should show that diversity of citizenship existed at the time the action was commenced. This proposition has been established in a number of cases, among the most important of which is

Laskey v. Newtown Mining Co., 56 Fed. 628, because it involves the law of the State of California. That case was decided by the Circuit Court of the Southern District of California on July 10, 1893, and Ross, District Judge, said (page 629):

> "This suit was brought in this court on the ground of the diverse citizenship of the parties, and, because the original complaint did not allege that either the plaintiffs or defendant reside within this judicial district, a demurrer to the complaint was sustained by the court. 50 Fed. Rep. 634. The plaintiffs thereupon amended their complaint, and alleged 'that the plaintiffs are now, and at all the times hereinafter mentioned were, citizens of the United States, and of the state of California, and are residents of the southern district of California'. To the amended complaint the defendant also demurred on the ground that its allegations are insufficient to give the court jurisdiction over the persons of the parties, or the subject of the action.

It will be observed that the allegation of the amended complaint, in respect to the residence of the plaintiffs in this judicial district, is in the present tense; that is to say, that plaintiffs were such residents at the time of the filing of the amended complaint. But the jurisdiction of the court depends upon the state of things existing at the time the suit is brought. Mollan v. Torrance, 9 Wheat. 537; Conolly v. Taylor, 2 Pet. 556. If, therefore, the court was correct in its former ruling, in holding that under the present judiciary act it is necessary that the complaint show the residence in the district in which the suit is brought, of either the plaintiff or defendant, and as is now conceded by the counsel for the plaintiffs, it follows, I think, that the difficulty has not been removed by the amendment. It is true, as stated by counsel, that the amended complaint relates back to, and takes the place of, the original complaint. In the language of the supreme court of this state (Barber v. Reynolds, 33 Cal. 501), it 'supersedes the original, but there is no dismissal of the action. It simply takes the place of the other. No new or different action is commenced, and no new cause of action is introduced. There is no change in the identity of the cause of action. That is the same as before. * * * The change consists merely in more fully setting forth the cause of action defectively alleged in the original complaint. It is the former complaint amended. The old complaint, in the form first filed, ceases to be the complaint in the case, or to perform any further function as a pleading; but the amended complaint falls into its place, and performs the same, and not different, functions'. But the circumstance that the amended complaint relates back to, and takes the place of, the original complaint, does not alter the facts alleged in the amended complaint. Those facts, so far

as the demurrer is concerned, must be taken to be just what the amended complaint alleges them to be. Upon the point in question the allegation is not that the plaintiffs were residents of this judicial district at the time of the commencement of the suit, but that they are such residents; that is to say, that they were such residents at the time of the filing of the amended complaint. The jurisdiction of the court, however, depends, as has been shown by the decisions of the supreme court above cited, upon the condition of things existing when the suit was commenced, and not at the time of the filing of the amended complaint. See, also, Stevens v. Nichols, 130 U. S. 230, 9 Sup. Ct. Rep. 518, where it was held that the federal court was without jurisdiction because the petition for removal from the state to the federal court did not allege the citizenship of the parties, except at the date when it was filed, and it was not shown elsewhere in the record that the defendants were at the commencement of the action citizens of a state other than the one of which the plaintiff was at that date a citizen. What was said of the case of Birdsall v. Perego, 5 Blatchf. 251, upon the point in question, is not, in my opinion, in harmony with the decisions of the supreme court already referred to. Demurrer to the amended complaint sustained with leave to plaintiffs to further amend within 20 days, if they shall be so advised."

Another important case is that of Sanbo v. Union Pac. Coal Co., 146 Fed. 80. In that case, *which practically is identical with the case at bar,* the allegations of diversity of citizenship were missing in both the original and the amended complaint and the court refused permission to file a sec-

ond amended complaint because it only appeared therefrom that diversity of citizenship existed as of the date of presenting the second amended complaint and not upon the date of presenting the original action. Riner, District Judge, said:

> "The original complaint in this case, containing two causes of action, was filed in this court on June 23, 1903. A demurrer to the complaint was sustained, with leave to amend. An amended complaint, also containing two causes of action, was filed November 9, 1903, to which a demurrer was filed and sustained. The plaintiff having elected to stand upon his amended complaint, a judgment was entered in favor of the defendant dismissing the case, and the plaintiff thereupon sued out a writ of error to the court of appeals for this circuit. 140 Fed. 713. The jurisdiction of this court depends upon the citizenship of the parties, and there being no allegation in the complaint that the plaintiff was a citizen of this or any other state, the judgment was reversed, upon the ground that the circuit court had no jurisdiction of the action, and the case was remanded to this court, with instructions to allow or refuse to allow an amendment in this particular in its discretion. On the 8th of February, 1906, plaintiff applied to this court for permission to file an amended complaint, containing but a single cause of action, and in which it is averred 'that the said plaintiff is a citizen of the United States and of the state of Colorado, and is a resident of the city and county of Denver in the state of Colorado'. Even in this proposed amended complaint there is no allegation that the plaintiff was a citizen of the state of Colorado at the time this action was begun, two years and seven months prior to the application to file this amendment. The necessary

allegation as to the citizenship of the parties was omitted altogether in the original complaint and also in the amended complaint, and in the amended complaint now sought to be filed the averment is that the plaintiff is (which means at this time, two years and seven months after the original action was brought) a citizen of the state of Colorado; not that he was such citizen at the time the suit was begun. This question was before the Supreme Court of the United States in the case of Menard v. Goggan, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. In disposing of the case, Chief Justice Waite said:

> 'If the necessary citizenship actually existed at the time the suit was begun, it will be for the court below to determine when the case gets back whether the record shall be amended so as to show that fact, and thus make out the jurisdiction.'

It will thus be seen that the amended complaint now sought to be filed does not come within the rule announced by the Supreme Court, and the motion for leave to file it will be denied."

To the same effect are:

Cochran v. Pittsburg S. & R. Co., 150 Fed. 682;

Internat. Banking Co. v. Scott, 159 Fed. 58;

Atchison Ry. Co. v. Frederickson, 177 Fed. 206.

In view of the fact that the proposed second amended complaint failed to allege jurisdictional facts existing at the time of the commencement of the action there can be no doubt that the lower

court not only had the right, but it was its duty, to refuse to permit the proposed second amended complaint to be filed.

No Cause of Action Stated in the Second Amended Complaint.

The same defect that existed in the amended complaint, is to be found in the proposed second amended complaint. It does not allege that the defendant came into the possession of the drugs illegally. On the contrary, this court will take judicial notice of the statutes of the State of California, among which is the so-called "Poison Act". (Statutes 1907, page 124 and amendments.)

Lloyd v. Mathews, 155 U. S. 222;
Missouri Ry. Co. v. Wulf, 226 U. S. 570.

Even though the plaintiff was the owner of the drugs, he had no right to have them in his possession unless he shows that he is a druggist or physician, or that he comes within the exceptions specified within the poison act. There is no allegation in any of the complaints that the plaintiff comes within such exceptions or that he is entitled to the possession of the drugs. Even though the defendants took the drugs from the plaintiff by force, they would be entitled to retain the possession of the drugs provided, of course, they did not trespass upon federal jurisdiction, and there is no allegation in the proposed second amended complaint that the drugs were seized while in the course of interstate commerce. Hence this proposed complaint

does not state a cause of action because it does not show that the plaintiff was entitled to the possession of the drugs.

26 R. C. L., page 1131, sec. 41.

Furthermore, as already stated, there is no allegation that the drugs came into the possession of the defendants illegally. There is no allegation that the defendants have converted the drugs to their own use. It is merely stated that the defendants are the owners and entitled to the possession of the drugs and that they made demand upon the defendants for their return which demand was refused. These allegations are not sufficient to constitute a cause of action for conversion. As far as the proposed second amended complaint shows, the defendants were lawfully in possession of the drugs at the time the demand was made. It is well-established that demand and refusal is not sufficient to constitute conversion but it must be expressly alleged that the goods were converted by defendant. Demand and refusal is merely evidence of a prior conversion having taken place and such evidence can be rebutted. In the case of

Ashton v. Heydenfeldt, 124 Cal. 14, 16,

the allegations were similar to those in the second proposed amended complaint. It was alleged that the defendant had in his possession certain stock belonging to the plaintiff and that the plaintiff had demanded the return of these goods, which had been refused. The court said:

> "Nor is it sufficient as a complaint for the conversion of the stock, since a conversion is not alleged. The allegation of a demand and refusal is not sufficient as an allegation of conversion, since 'the demand and refusal is only evidence of a prior conversion, not in itself conclusive, but liable to be explained and rebutted by evidence to the contrary.' "

In the case of

Ohio R. R. Co. v. O'Donnell, 49 Ohio 495,

the court said:

> "A refusal to deliver the property on demand of the owner, shows such an assumption of ownership or control, as to offer satisfactory evidence of a conversion, but it is only evidence. The ultimate fact to be pleaded is the conversion; and, in actions of that nature, a petition which, with proper allegations of the plaintiff's ownership of the property, and of its value, avers that the defendant converted it to its own use, states a cause of action."

To the same effect see:

Rosenbaum v. Dawes, 77 Ill. App. 309;

Race v. Chandler, 15 Ill. App. 532;

Kime v. Dale, 14 Ill. App. 308;

Cumberland Tel. etc. Co. v. Taylor, 44 Ind. App. 27, 88 N. E. 631;

Kennet v. Robinson, 2 J. J. Marsh 84;

Felcher v. McMillan, 103 Mich. 494;

Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6;

O'Donoghue v. Corby, 22 Mo. 393.

The proposed second amended complaint did not, therefore, state a cause of action in that it did not

appear therefrom that the plaintiff was in fact entitled to the possession of the drugs; and, furthermore, because, even assuming that he was so entitled, it is not alleged that the defendant converted the drugs to his own use. Since the complaint did not state a cause of action, the court was justified also on this ground in refusing to allow it to be filed.

The Bar of the Statute of Limitations.

The original complaint which was filed on June 24, 1919, alleged that the drugs were seized while in course of interstate commerce on April 16, 1915, and the action of conversion was based upon that seizure. This cause of action was barred by the statute of limitations. To escape the bar of the statute, plaintiff in his amended and second amended complaint alleged that he had demanded the return of the drugs on May 1, 1919, which demand had been refused. He sought to base his cause of action upon a conversion on May 1, 1919, arising through the demand and refusal. Not being able to rely upon the seizure of April 16, 1915, while the goods were in course of interstate commerce, he no longer had a federal question involved and he was, therefore, finally compelled to allege diversity of citizenship in order to give the court jurisdiction. We have already seen that he failed in the making of proper jurisdictional averments. Nor was there any merit in his ingenious plan to rely upon the supposed conversion on May 1, 1919, arising out of a demand and refusal on that date.

At the time of the hearing of plaintiff's motion for permission to file his second amended complaint, the affidavit of Louis Zeh (Transcript pages 28-30) was presented by the defendants and plaintiff did not contradict that affidavit by any showing whatever. It appeared from that affidavit that the drugs involved in this action were seized by the defendants on April 16, 1915. Since that time the said drugs have never been in the possession of plaintiff or of anyone acting for him. It further appeared that on September 27, 1915, the plaintiff had brought an action in claim and delivery in the District Court of the United States in and for the Southern District of California for the recovery of these drugs and in that complaint it was alleged that, prior to the commencement of that action, the plaintiff had demanded the return of the drugs from defendant, which had been refused.

It is conclusively established, therefore, that the drugs involved in this action were seized by the defendants on April 16, 1915, and, having never been returned, that the plaintiff, in an action brought in 1915, alleged that the defendants had then converted the drugs. It is well-established that the plaintiff cannot avoid the statute of limitations by making demand for the return of the drugs converted either before or after the statute of limitations had run on the original cause of action. If such an action could be permitted, it is obvious that the statute of limitations would be a farce. After the defendant had converted the plaintiff's goods,

and the statute had run on such conversion, the plaintiff could merely make demand for the return of the goods and create a new cause of action and so on in infinitum. Thus in the New York case of Kelsey v. Griswold, 6 Barb. 443, the court said:

> "It is insisted, however, for the plaintiff that the cause of action accrued at the time of the second demand and refusal in December, 1844. To this claim, it seems to me, there are several insuperable objections.
>
> 1. If the plaintiff is right, then is the statute of limitations virtually repealed, so far as the action of trover is concerned. For, no matter though the cause of action had accrued more than six years back, either by actual conversion or by a demand and refusal, the statute would begin to run from the second demand; and if the second demand and refusal have this power of taking a case out of the statute, a third and fourth must have the same power, and so on until the party shall choose to let six years elapse between any two of the numerous demands he may please to make."

In Granger v. George, 5 B. N. C. 150-108, English Reports. Full Reprint, page 56, Abbott, C. J. said:

> "But it appeared, that when in September, 1824, the boxes were demanded, the latter replied, that in 1818 he had delivered them over to certain persons whom he named; and it was proved that he had so parted with them on the 10th of November, in that year. It also appeared that the plaintiff's declaration was filed generally last Michaelmus term, the writ, however, was returnable on the 29th day of November. Under such circumstances, I thought I shall better to consider the bill as accepted

> on that day, which left the effect of the statute of limitations open to the defendant. Upon that point I thought, and I still retain the same opinion, that the statute began to run from the time of the act done by the defendant, although the plaintiff had not any notice of it; there not being evidence of any fraud practiced by defendant in order to prevent the plaintiff from obtaining knowledge of that which had been done. The plaintiff was certainly guilty of laches in not making inquiries respecting the property at an earlier period, and has no ground of complaint that he is not now entitled to recover."

See also:

Bruce v. Tilson, 23 N. Y., page 194.

In the following cases it was held that if an actual conversion had previously occurred, demand and refusal is evidence of conversion and relates back to that event:

Dealy v. Lance, 2 Spears. (S. C.) 467;
Talbird v. Baynard, 2 Hill (S. C.) 597.

It is indisputably shown that the drugs were seized in April 16, 1915, and have never since been in the possession of the plaintiff. If the drugs were seized while in the course of interstate commerce, the defendants obviously exceeded their jurisdiction and the taking of the property by virtue of a void writ would constitute conversion.

38 Cyc., page 2022, and cases cited.

Plaintiff's cause of action would arise at that time. As previously seen, demand and refusal are

merely evidence of conversion but do not constitute a conversion. Hence the cause of action of the plaintiff in this case accrued on April 16, 1915, and has long since been barred by the statute of limitations, and plaintiff cannot by subsequent demand for the return of the drugs create a new cause of action and so defeat the statute of limitations. The lower court was, therefore, justified in refusing to permit the second amended complaint to be filed in view of the undisputed showing that the cause of action attempted to be set forth therein was actually barred by the statute of limitations.

It was entirely discretionary with the lower court to permit, or refuse to permit, the proposed second amended complaint to be filed and it is well-established that its action will not be overruled unless the court has grossly abused its discretion.

> Loeb v. Eastman Kodak Co., 183 Fed. 704;
> Gormley v. Bunyan, 138 U. S. 623.

The plaintiff has entirely failed to show that the lower court abused its discretion in refusing him permission to file his proposed second amended complaint; on the contrary, we believe that we have fully established that the action of the lower court in refusing such permission and in dismissing the action, was not only a proper exercise of its discretion, but was the only ruling it could justifiably make in the premises. We therefore, respectfully submit that the orders of the district court in sus-

taining the demurrers to the complaint and the amended complaint and its judgment dismissing the action should be affirmed.

Dated, San Francisco,
December 27, 1920.

Respectfully submitted,
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